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NTSB Order No. EA-4995

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 17th day of September, 2002

MONTE R. BELGER Acting Administrator, Federal Aviation Administration, Complainant, v. DANIEL OLIVEIRA and ANDRE PAUL MORAIS, Respondents.	Dockets SE-16633 and SE-16640

OPINION AND ORDER

Respondents appeal the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr., rendered in this emergency revocation proceeding, after an evidentiary hearing, on August 15, 2002.[1] By that decision, the law judge upheld respondent Oliveira's alleged violation of sections 91.13(a), 91.119(a), 91.119(b), 91.119(c), and 91.215(b)(2), and respondent Morais' alleged violation of sections 61.3(C)(1), 61.23(a)(2),

[1] An excerpt from the hearing transcript containing the law judge's decision is attached.

91.13(a), 91.111(a), 91.119(a), 91.119(b), 91.119(c), 91.215(b)(2), 91.303(b), 91.303(c), 91.303(d), and 91.303(e) of the Federal Aviation Regulations ("FARs"), and affirmed the Administrator's revocation of respondents' commercial pilot certificates.[2] We deny respondents' jointly-filed appeal.

The gravamen of the Administrator's complaints is that respondents lack the degree of care, judgment and responsibility required of FAA-certificated airmen. The basic facts are not in dispute. On July 4, 2002, respondents flew in formation at low altitude in the vicinity of Jones Beach and Rockaway Beach, New York.[3] Respondents flew well within 500 feet of swimmers in the water and objects near the shoreline. Moreover, respondents had turned off their aircrafts' transponders and were not in communication with JFK tower or other Air Traffic Control ("ATC") personnel despite their proximity to John F. Kennedy International Airport ("JFK").[4] At the time, the entire country,

[2] The relevant provisions of FAR sections 61.3 and 61.23 (14 C.F.R Part 61), and FAR sections 91.13, 91.111, 91.119, 91.215, and 91.303 (14 C.F.R. Part 91) are set forth in Appendix A. The Administrator's Emergency Orders of Revocation against respondents Oliveira and Morais, which serve as the complaints in this proceeding, are also set forth in their entirety in Appendix A.

[3] Respondent Morais, the lead pilot, was flying a Piper PA-18, and respondent Oliveira was flying a Cessna 182.

[4] FAR requirements dictate that, unless otherwise instructed by ATC personnel, all aircraft operating within the 30-mile "veil" of JFK, among other major airports, be equipped with an *operable* altitude-encoding altimeter. Although radio communications with ATC were not required, given that respondents were in the transition area below JFK's Class B airspace, the absence of any communication, when combined with the absence of an active Mode C transponder, deprived ATC of any knowledge regarding the 3-dimensional position of respondents' aircraft within the congested airspace.

and the New York City area in particular, were at a heightened state of alert for possible aerial-borne and other terrorist threats.[5]

Respondents' flight attracted the attention of many people at the beach. Consequently, the New York Police Department ("NYPD"), in response to calls to 9-1-1 dispatchers and a notification from a Nassau County Harbor Unit, dispatched an NYPD helicopter (hereinafter "NYPD Four") to investigate. The NYPD Four crew, who first sighted respondents when they were south of Floyd Bennett Field, estimated that respondents were 25 to 50 feet above the surface and flying within several hundred feet of the beach. The NYPD Four crew, who was aware from its communications with JFK tower that respondents' aircraft were not emitting transponder signals and not communicating with ATC, maneuvered for a closer inspection. NYPD Four approached perpendicular to, and ahead of, respondents' flight path, and at an altitude several hundred feet above, and rocked the helicopter's rotor blades in an effort to attract respondents' attention. When that effort failed to yield any response, communication or signal from either aircraft, the NYPD helicopter approached closer still, maneuvering ahead of and across their flight path, while still several hundred feet above their altitude.[6] As respondent Morais approached NYPD Four, he

[5] There were no Temporary Flight Restrictions ("TFRs"), or additional security measures, in effect for pilots operating in the vicinity of Jones Beach and Rockaway Beach on July 4, 2002. TFRs were in effect for central Manhattan and over the Statue of Liberty.

[6] Regarding the NYPD helicopter interception, Oliveira testified

suddenly initiated an abrupt climbing turn toward it, passing within 30 feet of the helicopter. The crew of NYPD Four made a violent maneuver in order to avert what they believed was an imminent mid-air collision.[7] Respondent Oliveira, who was to the

(..continued)
that he saw the helicopter but didn't recognize it as an NYPD helicopter. He testified that his attention was mostly focused on Morais, in the lead aircraft, and that he was wondering "what is this helicopter doing … does he see us?" Respondent Morais testified that he eventually saw the silhouette of a helicopter, and "probably at 500 feet to my one to two o'clock, I saw the rotors rocking, first, my first thoughts were, okay, some guy is rocking his rotors at us, you know, I am not sure if he is trying to get my attention or if there is an aircraft around that he was trying to get his attention." Id. Morais continued:

> I didn't, because of our, what we were doing that day, I never thought that it could have been an NYPD helicopter, who was trying to intercept us. So, I just, I really didn't pay it any attention, because my, my thoughts were to just to get back home and there was fireworks going off that night, so that, you know, that was my intention to go out with the guys and enjoy the 4th of July. So, so, you know, I continued my southwest heading and the helicopter came closer. I still looked at him, and it came closer and I still wasn't sure what was happening. I just knew this, I saw a silhouette of a black tarp, helicopter coming towards me. And still continued to, I didn't pay it any attention. I just kept flying....

Tr. at 409-413. On cross-examination, respondent Morais admitted telling agents of the FBI and New Jersey State Police that when he first saw the helicopter silhouette rocking its wings near JFK airport, the thought occurred to him that it might be a police helicopter because of heightened security around the 4th of July; he also stressed, however, that he didn't *know* it was an NYPD helicopter until immediately before the near-collision when he saw the police markings on the helicopter. "I knew I wasn't doing anything wrong … that is why it didn't occur to me that it could have been a police helicopter … until he cut in front of me and I saw the designation on the side[.]" Tr. at 440.

[7] The contemporaneous recording of ATC communications with the NYPD helicopter indicates that, at 6:38 p.m., the NYPD crew radioed, "Kennedy just to be advised the ah far south target with the ah red tips on his wings just tried to come at us so we'll follow these targets."

right of respondent Morais' aircraft just before Morais' abrupt maneuver, rejoined Morais' aircraft, and respondents continued their formation flight. After the near-collision with Morais' aircraft, which the crew of NYPD Four believed was an intentional maneuver toward them, NYPD Four, as well as other NYPD helicopters that joined them, proceeded to follow respondents at a safe distance. During this time, fighter aircraft flying combat air patrol over New York were directed to descend and, it appears, intercept respondents' aircraft.[8] Upon landing at Belmar, respondents were taken into custody, at gunpoint, by state and federal law enforcement officers.

Respondents testified at the hearing. They claimed, and it is not now disputed, that they had spent the day towing banners for Aerial Sign (the operator of both aircraft) in Cape Cod, and were returning to their local base at Belmar. According to respondents, when they were flying down the southern coast of Long Island, Oliveira's radio began to fade or "die," so Morais offered to fly lead in formation flight. Both admitted not having their transponders activated. Respondent Morais acknowledged stating to agents of the Federal Bureau of Investigation ("FBI") and New Jersey State Police, after being taken into custody, that he was "hot dogging" as they flew down

[8] Whether the fighter aircraft actually intercepted respondents' aircraft, or, indeed, what the fighter aircraft did relative to respondents' aircraft, is not clear from this record. The official New York TRACON record indicates that at 2310 UTC, or approximately 30 minutes after the NYPD helicopter reported having to take evasive action to avoid a collision with Morais' aircraft, "NYPD ADVISES THAT THE 2 ACFT HAVE LANDED AT BLM AND THEY ARE ALSO LANDING. NORAD NOTIFIED AND F-15'S (sic) ARE CLIMBING BACK TO … IN THE YANKEE CAP."

the coastline, and both respondents testified that they flew low over the water, sometimes as low as 50 feet above the surface. Respondents testified, however, that they strove at all times to, and did, avoid flying within 500 feet of any person or object. They testified that they prefer to stay close to the beach in the event a power failure required them to ditch the aircraft in the ocean. Respondents opined that, except for the police "interception," the flight was a routine one back to their base.[9]

Officer Dennis DeRienzo, the pilot of NYPD Four, testified that he observed respondents' aircraft flying within several hundred feet of the beach and at an altitude of 25 to 50 feet over numerous swimmers who were in the water. Officer Anthony SanSeverino, the copilot aboard NYPD Four, provided corroborating testimony. Both officers testified that, in their opinion, respondents were flying recklessly. In addition, the Administrator presented testimony from two persons who observed respondents' aircraft, as well as a videotape that one of them made of a portion of respondents' low-level flight (Joint Exhibit 3). These witnesses testified that the aircraft were flying very low, that there were numerous swimmers in the water and

[9] Respondents also presented expert testimony from a witness who analyzed thousands of pages of primary radar data, but this witness was unable to make definitive conclusions other than to assert the uncontroverted belief that the "interception" occurred away from the beach and over the open ocean (respondents had turned towards Belmar and out over the ocean by that time). In addition, the owner of Aerial Sign testified regarding normal procedures when transitioning beneath the JFK veil, but his testimony, and respondents' testimony, did not establish that respondents' uncommunicated decision to proceed with their transponders turned off was permissible or routine.

persons on the shore that were in close proximity to the low-flying aircraft, and that they were frightened by what they observed.

The law judge, after making implicit credibility findings in favor of the Administrator's percipient witnesses,[10] summarily found that the Administrator had proved the violations alleged in her complaints and affirmed the Emergency Orders of Revocation. On appeal, respondents argue that, at most, the evidence merely indicates that respondents very briefly flew closer than 500 feet to swimmers or other objects, and, they argue, Board precedent does not support emergency revocation for such conduct. In addition, respondent Morais argues that the law judge's decision was clearly erroneous because no evidence was introduced in support of several of the charges against respondent Morais.[11] The Administrator urges us to uphold

[10] See, e.g., Administrator v. Smith, 5 NTSB 1560, 1563 (1986) (a law judge's credibility determinations regarding conflicting testimony will not be reversed absent a showing of clear error).

[11] Respondents' remaining arguments – including their attempt to downplay the credited testimony of numerous disinterested witnesses – have no merit. We discern no factual basis for allegations that the law judge was biased by the venue of the hearing. Respondents also make much of the aircraft interception procedures set forth in the Airman's Information Manual and the NYPD helicopter's allegedly-improper "interception," and urge us to condemn as inappropriate what they claim is an NYPD "mindset" that it is permissible to conduct "civilian interceptions and ultimately shootdowns." First, we think this argument overemphasizes testimony by the NYPD officers, under cross-examination, regarding their sense that they and New York were "at war" against terrorism, and their confessed-concerns at the time of the incident about not knowing what respondents' intentions were. The fact remains, of course, that respondents were not fired upon. Second, and more importantly, the only bearing such an argument has on this proceeding is as a possible

the law judge's decision and the Emergency Orders of Revocation.

We start our analysis by isolating those charges that were either admitted or which are not now contested. The FAR section 91.215(b)(2) charges were admitted by both respondents. Moreover, the act of flying within the 30-mile Mode C veil surrounding JFK, without activating their transponders or with the express permission of ATC to have them disabled is, *a fortiori*, a careless and reckless operation and a violation of FAR section 91.13(a).[12]

(..continued)
defense for respondent Morais to the charges associated with his abrupt maneuvering. We discern nothing so egregious or imprudent in the NYPD helicopter's operations to merit, in the context of this enforcement proceeding, a non-germane discussion on our part as a matter of broader public safety. Decisions regarding the safe and effective execution of missions assigned to law enforcement aircraft are, in actuality, the shared purview of the Federal Aviation Administration, which is no doubt aware of the events underlying this proceeding, and the police organizations that oversee and train pilots in the context of their specific law enforcement functions.

[12] We disagree with the law judge's description of this violation as merely "technical" in nature, for we find it inherently incredible that respondents, who are commercial-rated pilots, would believe that prior operations, where ATC instructed them to turn off the transponder (a situation where controllers would, obviously, have knowledge of their presence), would suggest their course of action was permissible or prudent on a subsequent flight during which ATC had not so instructed them. Of course, respondents' motives for turning off their transponders, while having a bearing, perhaps, on sanction, is not relevant to the issue of whether they violated FAR section 91.215(b)(2). Respondent Oliveira also testified that he believed Morais had his transponder on and, since he was flying in formation with Morias, it was not important that he, Oliveira, turn on his transponder. Again, absent an instruction from ATC personnel, there is no regulatory foundation for Oliveira's claimed assumption. Cf. Administrator v. Grossman, et al., 3 NTSB 3302, 3303 (1981) (while flying in formation flight, "each pilot-in-command ... is directly responsible for, and is the final authority as to, the operation of that aircraft") (internal

Respondent Morais also admitted to violating FAR sections 61.3(c)(1) and 61.23(a)(2) by operating his aircraft without an appropriate medical certificate on July 4, 2002, and during numerous commercial banner-towing flights.

Turning to the alleged violations stemming from the low flight, respondents concede that if we accept the testimony of the Administrator's witnesses (which we do, for respondents have not shown the law judge's credibility findings to be in error), "the evidence revealed two low flights or minor 'buzz jobs.'" A single instance, of course, is sufficient to support an FAR violation. Clearly, the ocean along the beach was not "open water," and, in any event, even if it were, respondents' aircraft came much closer than the 500 feet from persons and structures permitted by FAR section 91.119(c). Similarly, the populated beaches, with numerous adjacent swimmers and boats, meet, at least while respondents maneuvered so close to the beach so as to overfly swimmers, the criteria set forth in FAR section 91.119(b) proscribing overflight of "any open air assembly of persons." Finally, the collective testimony about the relative congestion of swimmers and watercraft in the vicinity, and respondents' operation of their aircraft in this area at altitudes below 100 feet, guaranteed that respondents would have had precious little time and room to maneuver in the event an engine failure

(..continued)
quotations omitted).

necessitated an emergency landing in the water or on the beach. This reduced margin for error or opportunity to avoid persons or structures plainly created an "undue hazard to persons and property on the surface." We therefore affirm the law judge's decision to uphold the FAR section 91.119(a), 91.119(b) and 91.119(c) charges.

Turning to the charges against respondent Morais stemming from his sharp turn toward and near collision with the NYPD helicopter, we note that at the hearing Morais testified that his maneuver was not necessary for normal flight. Additionally, the probative and credited evidence from both the NYPD helicopter crew and, even, respondent Oliveira indicates that Morais' maneuver was abrupt and, indeed, startlingly so. Aerobatic flight, for purposes of FAR section 91.303, is defined as "an intentional maneuver involving an abrupt change in an aircraft's attitude, an abnormal attitude, or abnormal acceleration, not necessary for normal flight." In other words, the issue is not whether respondent Morais engaged in aerobatic flight, or flew so close to the NYPD helicopter so as to create a collision hazard, but whether he had any justification for operating his aircraft as he did. He has not identified any justification.

We cannot understand why respondent Morais, who was aware of the helicopter's relative altitude above him and general progress toward him from a direction proceeding from his right towards his path of flight, would suddenly and

abruptly climb and maneuver his aircraft in the manner that he did. This record is clear that, although the two aircraft were in close proximity just before Morais' maneuver, there was approximately several hundred vertical feet of separation between them. It was not necessary for Morais to maneuver in that manner, and any "emergency" that he now says that he felt he found himself in was essentially of his own making. In this regard, we note respondent Morais' acknowledgment of the unique security sensitivity in the New York area in connection with the July 4 holiday; his decision to fly at extremely low altitude in the New York City vicinity with his Mode C transponder turned off; and, despite the presence of what he had already thought *might* be a police helicopter, his failure to do anything to alter what he observed to be a converging flight path with the still relatively-distant-but-converging helicopter. Under the circumstances, we do not find Morais' claim that his abrupt maneuver resulted from his being startled by the helicopter's position to be credible or exculpatory. Rather, we think respondent was properly held accountable for the violations associated with the maneuver. See, e.g., Administrator v. Blose, NTSB Order No. EA-4656 at 10 (1998). We find, therefore, that the law judge did not err in upholding the FAR section 91.111(a) and 91.303(e) violations.

Turning to the individual FAR section 91.303 charges associated with the aerobatic maneuver, however, we agree

with respondent Morais that there was no substantial direct evidence presented to support the FAR section 91.303(b), 91.303(c) and 91.303(d) violations. It appears that the Administrator essentially abandoned those charges at the hearing, and, therefore, we dismiss them as not adequately proven.

Finally, we turn to the issue of sanction. Respondents argue that, at most, their regulatory transgressions justify suspension of their certificates. We disagree. FAA Inspector Scott Goccia testified as an expert on general aviation. He observed that respondents are commercial pilots and the regulatory proscriptions at issue – maintaining minimum safe altitudes and having transponders turned on within the Class B airspace veil – are not complicated or difficult to follow. He also opined that it was not a benign mistake that respondents operated their aircraft near JFK with their transponders turned off, but, rather, indicative of an intent to escape official detection while “hot dogging” through the area. Inspector Goccia, who testified that respondents’ actions were “reckless,” agreed with the Administrator’s decision to seek revocation. Inspector Goccia, and the Administrator, are clearly focused not just on respondents’ regulatory violations, but, in addition, on the context in which they occurred, i.e., when “everybody in New York, let alone the nation, was walking on eggs waiting for the next shoe to drop.” As Inspector Goccia observed: “It wouldn't have surprised me if they were shot down.... The people on the ground who the FAA serve, I'm sure, would agree with me to say

that we, the people on the ground, I as an inspector and I as a fellow pilot, do not want airmen like this in the air[.]" Tr. at 288.

We have consistently held that revocation is an appropriate sanction for pilots who demonstrate that they lack the care, judgment and responsibility required of airmen. We find that respondents' decision to operate impermissibly low over people and property in dense airspace without using their transponders demonstrates an unacceptable disregard for the safety of others and, most important for our decision with regard to sanction, a disposition to flaunt important safety regulations.[13] See, e.g., Administrator v. Blackman, 7 NTSB 341, 343 (1990) (upholding revocation for a TCA airspace violation, in large part because evidence that respondent turned off transponder to avoid detection after penetrating TCA demonstrated willingness to advance personal interests even when doing so would compromise air safety); see also Administrator v. Hock, 5 NTSB 892, 894 (1986) (a "single incident of regulatory noncompliance reflecting a deliberate disregard or gross indifference to the requirements of air safety may ... warrant the conclusion that the airman, due to inability or disinclination" cannot be trusted to follow the rules and regulations imposed by the Administrator). We disagree, as we have already mentioned, with the law judge's

[13] In addition, we view respondent Morais' repeated operation as a commercial pilot without a required second-class medical certificate as indicative of a non-compliance disposition that is an independent ground for revocation. Our dismissal of several of the Administrator's charges against respondent Morais does not affect our decision with regard to sanction.

observation that respondents' failure to activate their transponders amounted to a mere "technical" violation of FAR section 91.215(b)(2). Respondents' explanations regarding why their transponders were not turned on were, we think, inherently not credible and, in any event (particularly given the law judge's credibility findings against respondents' testimony regarding disputed factual matters), insufficient to rebut the expert testimony of Inspector Goccia that respondents' behavior in this regard was consistent with an effort to avoid detection. Although it is not necessary to support the sanction of revocation, we also think that respondents' election to proceed in their reckless fashion amidst the heightened security concerns demonstrates extremely poor judgment that, in and of itself, is consistent with the Administrator's conclusion that revocation of their certificates is warranted.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondents' appeal is denied[14]; and

2. The initial decision and the Administrator's Emergency Orders of Revocation are, consistent with this opinion and order, affirmed.

CARMODY, Vice Chairman, and HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

[14] Respondents' request for oral argument is denied, for we discern no good reason for granting the request.